

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 2, 1993

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 92-2145

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ARIE G. OLDHAM,

Plaintiff-Respondent,

v.

**LABOR AND INDUSTRY
REVIEW COMMISSION,**

Defendant-Appellant,

**KLUG AND SMITH COMPANY,
and GREAT AMERICAN
INSURANCE COMPANY,**

Defendants.

APPEAL from a judgment of the circuit court for Dane county:

P. CHARLES JONES, Judge. *Affirmed.*

Before Eich, C.J., Sundby and Snyder, JJ.

PER CURIAM. LIRC appeals from a judgment partially reversing its decision in a worker's compensation proceeding and remanding for further administrative review. The matter involves a dispute over the amount of worker's compensation owed to Arie Oldham from his former employer's worker's compensation carrier, Great American Insurance Company (GAIC). We agree with the trial court's disposition of the matter and therefore affirm.

Oldham suffered a work-related injury in 1968. He received worker's compensation benefits but also filed an action against the alleged tort-feasors. In 1973, the parties to that action settled for a total sum of \$650,000 on Oldham's claim. After deducting attorney fees and costs, GAIC received \$64,000 and Oldham received \$421,000. Of the latter amount, the stipulation provided that "\$259,517.70 shall be offset against any future worker's compensation claim that the injured party may make against the employer or its workman's compensation insurer." The parties refer to that offset amount as "the cushion." The court approved the stipulation.

Oldham remains disabled and has required daily medical care since his injury. This litigation commenced in 1987 to determine how much of the cushion remained after calculating his worker's compensation entitlement since 1973. LIRC concluded that the entitlement included, among other things, compensation for three hours of home health care per day, provided by Oldham's wife, at the prevailing

wage rate for a home health aide. LIRC also concluded that under sec. 102.29, Stats., Oldham was not entitled to receive the cushion in 1973, because that sum should have been deposited in an interest bearing trust account. LIRC therefore ordered a credit for GAIC against its obligation to Oldham, equal to the interest that could have been earned on the cushion since 1973 had it been placed in trust.

Oldham petitioned for judicial review. The trial court remanded for further consideration of the home health care issue. The court also reversed LIRC's decision to credit GAIC with interest on the cushion. LIRC appeals those rulings.

The trial court properly remanded the home health care issue. Substantial evidence supported LIRC's finding that three hours of home health care was reasonably necessary, and therefore compensable, while any additional care that Mrs. Oldham provided was not reasonably required. However, that finding, by itself, is insufficient to sustain the award for merely three hours of home health care per day. Oldham presented evidence that his wife provided substantial additional daily care on his physician's advice. When an employee in good faith relies on a physician's recommendation for treatment, LIRC must allow compensation for that treatment even if it proves unnecessary. *Spencer v. DILHR*, 55 Wis.2d 525, 531-32, 200 N.W.2d 611, 614-15 (1972). A remand is therefore appropriate for findings as

to the amount of care Oldham's physician recommended beyond three hours per day and whether Oldham followed that recommendation in good faith.

The trial court properly reversed LIRC's award of an interest credit. Section 102.29, Stats., provides that, where an employee receives worker's compensation and recovers in a tort action, the employer or its insurance carrier "shall be reimbursed for all payments made by it, or which it may be obligated to make in the future Any balance remaining shall be paid to the employee" LIRC contends that this provision and the cases interpreting it require the court in a tort action to place offsets for the plaintiff's future worker's compensation in an interest bearing trust fund. However, we need not decide whether LIRC correctly interprets sec. 102.29. The court awarded Oldham the \$259,517.70 cushion pursuant to a stipulation that failed to grant GAIC an interest credit. "If all the parties ... agree to a settlement that contemplates a method of distribution differing from that directed by sec. 102.29, Stats., they may do so." *Skirowski v. Employers Mut. Casualty Co.*, 158 Wis.2d 242, 250, 462 N.W.2d 245, 249 (Ct. App. 1990). That is what occurred here.¹

¹ Additionally, LIRC does not cite its authority for modifying the trial court's order in Oldham's tort action. Even if the trial court erred when it approved the stipulation, its order is the law of the case.

By the Court.--Judgment affirmed.

This opinion will not be published. See Rule 809.23(1)(b)5, Stats.